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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EVERT KEITH HOWARD,

Defendant and Appellant.

F036961

(Super. Ct. No. 0655083-4)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. James L. Quaschnick, Judge.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and W. Scott Thorpe, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Evert Keith Howard, while driving a stolen vehicle and attempting to elude California Highway Patrol officers, caused a collision with another vehicle, killing its driver and seriously injuring its passenger. A jury convicted him of second degree felony murder. (Pen. Code, § 187.) He was also convicted of eluding a pursuing peace officer and causing serious bodily injury to a separate victim (Veh. Code, § 2800.3) and eluding a peace officer while driving with a willful or wanton disregard for the safety of persons or property

(Veh. Code, § 2800.2).[1] During trial, defendant pleaded guilty to three counts of unlawful driving or taking of a vehicle. (§ 10851.) Defendant claims it was error to convict him of second degree murder based on a finding that a violation of section 2800.2 is an inherently dangerous felony. He also raises claims of instructional error. We affirm.

FACTS

On May 23, 2000, Luis Garcia drove his 1997 Chevrolet Tahoe (Tahoe), a sport utility vehicle, to work. When he prepared to leave his place of employment at 3:30 p.m., he discovered his car was gone.

After midnight on May 24, 2000, California Highway Patrol Officer Gary Stephany was on duty. He was in uniform and was driving his marked California Highway Patrol vehicle. His partner, Officer Wayne Bernard, was a passenger in the car. Stephany noticed a Tahoe being driven on the road that did not have a rear license plate (a Vehicle Code infraction). He decided to stop the vehicle and activated his red lights, signaling defendant, the driver of the Tahoe, to pull over.

Defendant pulled the Tahoe to the side of the road, stopping the vehicle. Laurie Bennett was a passenger. The officers instructed defendant to turn off the motor. He complied. Officers Stephany and Bernard got out of their patrol car and approached the Tahoe. Defendant started the Tahoe and drove off. The officers returned to their patrol car and followed defendant with their lights and sirens activated. Defendant drove at a high rate of speed, exceeding the speed limit; he ran stop signs and stoplights; and at one point he drove the wrong way on a street. Defendant drove the Tahoe off the paved road and began traveling on a dirt road. The dirt and debris obscured Stephany's vision and he lost sight of defendant. While Stephany was following defendant, defendant engaged in some "pretty highly skilled maneuvers" with the car, including countersteering at corners.

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[1] Further statutory references are to the Vehicle Code unless otherwise noted.

California Highway Patrol Officer Anthony Arcelus was working in the early morning hours of May 24, 2000. He was in uniform and in a marked patrol car. He was monitoring the pursuit of the Tahoe by Officer Stephany. Arcelus saw the Tahoe. He activated his lights and sirens and began to follow it. While being followed by Arcelus, defendant violated several traffic laws. Arcelus determined that the pursuit was entering a part of town that had more traffic and it was too dangerous to proceed. He stopped his pursuit and temporarily lost sight of the Tahoe. He then saw the Tahoe enter an intersection on a red light. The Tahoe collided with a white car entering the intersection from the left, eastbound, direction. During the pursuit, Arcelus was surprised at defendant's driving abilities.

John Mikkelsen was working at the intersection where the crash occurred. He was inspecting a manhole when he heard a huge explosion. He looked up, saw flames and debris flying, and noticed that the eastbound traffic light was green.

Jeannette Rodriguez, the driver, and Robert Rodriguez, her husband, were ejected from the white car. Jeannette died as a result of the collision and Robert was seriously injured.

Defendant suffered injuries himself. Paramedic Roy Jobe asked defendant what his location was in the vehicle when the accident occurred. Defendant stated he was the driver of the vehicle. Defendant's injuries were consistent with his being the driver. There was nothing about defendant's demeanor at the accident that indicated to the paramedic that defendant was under the influence.

One officer estimated that the Tahoe was traveling at 80 miles per hour at the time of the collision and the white car was traveling somewhere near the speed limit. Another investigator was unable to determine the speed of the vehicles at the time of the accident.

A forensic toxicologist analyzed samples from defendant and Jeannette. It was the toxicologist's opinion that Jeannette was under the influence of cocaine and heroin at the time of the crash. Defendant had a high level of methamphetamine in his system. A person

under the influence of methamphetamine would have problems functioning normally, but would be able to make choices and decisions. Those choices and decisions cannot be made safely.

Defense

Defendant testified on his own behalf. He admitted that the car was stolen. He remembered being scared and driving fast but did not remember anything after that. He saw the white car before the collision but did not see the red light. His cousin, "Billy Bukovich," taught him how to race cars when he was younger.

DISCUSSION

I.

Inherently Dangerous Felony

Defendant was convicted of second degree murder based on the felony-murder rule. Under the felony-murder rule the People are not required to prove malice. The intent to commit a felony inherently dangerous to human life is substituted for malice. (*People v. Patterson* (1989) 49 Cal.3d 615, 626.) Inherently dangerous felonies are explicitly set forth for first degree murder in Penal Code section 189. Second degree felony murder is nonstatutory and requires proof that the killer was engaged in a felony inherently dangerous to human life. (*People v. Hansen* (1994) 9 Cal.4th 300, 308.)

The ostensible purpose of the felony-murder rule is to deter those engaged in felonies from killing negligently or accidentally. "[T]he justification for the imputation of implied malice under these circumstances is that, 'when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life….'" (*People v. Hansen*, *supra*, 9 Cal.4th at p. 308.) The felony-murder rule does not apply when the felony is not inherently dangerous because "'"it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the

felony."' [Citation.] Thus, under the latter circumstances the commission of the felony could not serve logically as the basis for imputation of malice. [Citation.]" (*Ibid.*)

"Implied malice, for which the second degree felony-murder doctrine acts as a substitute, has both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and … acts with a conscious disregard for life.' [Citation.]

"The second degree felony-murder rule eliminates the need for the prosecution to establish the *mental* component. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The *physical* requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed 'an act, the natural consequences of which are dangerous to life' [citation], thus satisfying the physical component of implied malice." (*People v. Patterson*, *supra*, 49 Cal.3d at p. 626, fn. omitted.)

"In determining whether a felony is inherently dangerous, the court looks to the elements of the felony *in the abstract*, 'not the "particular" facts of the case,' i.e., not to the defendant's specific conduct." (*People v. Hansen*, *supra*, 9 Cal.4th at p. 309.) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89, the Supreme Court determined that an inherently dangerous felony is one which, "by its very nature, … cannot be committed without creating a substantial risk that someone will be killed.…" In *People v. Patterson*, *supra*, 49 Cal.3d at page 627, the court defined an inherently dangerous felony for purposes of the second degree felony-murder doctrine as "an offense carrying 'a high probability' that death will result."

The underlying felony for defendant's second degree felony-murder conviction here was a violation of section 2800.2. That section states:

"(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or may impose both that imprisonment or confinement and fine.

"(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."[2]

Defendant claims that a violation of section 2800.2 is not a felony inherently dangerous to human life. He argues that a wanton disregard for human life is not the key element of section 2800.2; rather, the key element is "wanton disregard for the safety of

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[2] Section 2800.1 provides in pertinent part:

"(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:

"(1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.

"(2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.

"(3) The peace officer's motor vehicle is distinctively marked.

"(4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform."

persons or **property**." He asserts that this element can be committed without necessarily creating a substantial risk that someone will be killed.

In *People v. Burroughs, supra,* 35 Cal.3d at page 830 a bipartite standard was utilized to determine if practicing medicine without a license was an inherently dangerous felony. First the court looked to the primary element of the offense and next to the factors that elevate the offense to a felony. Under the first portion, the court found that "'treating the sick or afflicted'" is not inherently dangerous to human life because "[o]ne can certainly conceive of treatment of the sick or afflicted which has quite innocuous results--the affliction at stake could be a common cold, or a sprained finger, and the form of treatment an admonition to rest in bed and drink fluids or the application of ice to mild swelling."

Under the next level of analysis, the *Burroughs* court looked at the factors elevating the unlicensed practice of medicine to a felony. Those factors were practicing medicine without a license under "'circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, *or death*.'" (*People v. Burroughs, supra,* 35 Cal.3d at p. 830.) The court found, based on several reasons, that the factors used to elevate the crime to a felony were not sufficient to find that the felony was one inherently dangerous to human life. First, "[t]hat the Legislature referred to 'death' as a separate risk, and in the disjunctive, strongly suggests the Legislature perceived that one may violate the proscription against the felonious practice of medicine without a license and yet not necessarily endanger human life." (*Ibid.*) Next, a risk of great bodily harm could include something such as a bone fracture that does not jeopardize the life of the victim. (*Id*. at p. 831.) Also the category of a risk of serious mental illness might include a range of conditions which would not be placing the patient's life in jeopardy. (*Id.* at pp. 831-832.)

The *Burroughs* court listed felonies where it was found that the underlying felony was inherently dangerous to human life, noting that each of these offenses was "tinged with malevolence." These included poisoning food, drink, or medicine with intent to injure; the willful and malicious burning of an automobile; and kidnapping. Felonies found not to be

inherently dangerous included false imprisonment, possession of a concealable firearm by an ex-felon, escape from a city or county penal facility, grand theft by false pretense, and conspiracy to possess methedrine illegally. (*People v. Burroughs, supra,* 35 Cal.3d at p. 833.) The court concluded that practicing medicine without a license was not a felony inherently dangerous to human life.

Defendant relies on the test in *Burroughs* in an attempt to undercut two appellate court opinions that hold a violation of section 2800.2 is a felony inherently dangerous to human life for purposes of the second degree felony-murder rule.

People v. Johnson (1993) 15 Cal.App.4th 169 presented a fact situation similar to what occurred here. Johnson maintained on appeal that his conviction of second degree felony murder based on a violation of section 2800.2 could not stand because the offense is not inherently dangerous, nor is it "'an offense carrying "a high probability" that death will result.'" (15 Cal.App.4th at p. 173.) The *Johnson* court disagreed. "It would seem clear as a matter of logic that any felony whose key element is 'wanton disregard' for human life necessarily falls within the scope of 'inherently dangerous' felonies." (*Ibid.*)

While finding some superficial plausibility to the defendant's argument that because the statute encompasses "disregard for the safety of persons *or property,*" violation of section 2800.2 is not an inherently dangerous felony because a disregard for property is not inherently dangerous, the *Johnson* court rejected the argument.

"To begin with, giving the statutory language involving 'wanton disregard' for the safety of 'persons or property' a commonsense construction, it appears the 'wanton disregard' in question is total, rather than selective. That is, the disregard is for everything, whether living or inanimate.

"As the Attorney General also points out, apart from the 'wanton disregard' element, one must also be engaged in the act of fleeing from a pursuing peace officer whose vehicle is displaying lights and sirens. Any high-speed pursuit is inherently dangerous to the lives of the pursuing police officers. In even the most ethereal of abstractions, it is not possible to

imagine that the 'wanton disregard' of the person fleeing does not encompass disregard for the safety of the pursuing officers. In short, it does not appear that the phrase 'or property' may properly be construed to limit the mental state of the offender, and thus to make fleeing a pursuing police vehicle other than 'inherently dangerous.'

"We have come to similar conclusions in other cases. *In People v. Pearch* (1991) 229 Cal.App.3d 1282, 1297-1299 we held kidnapping to be such an 'inherently dangerous felony' as would support a conviction of second degree felony murder. There, we stated that kidnapping is 'fraught with violence--either the actual use of physical force or the threat of physical harm.' (*Id.* at p. 1297.)

"*Pearch* referred to the 'threat of physical harm.' While a kidnapping presents a *threat* of such harm to the victim, fleeing from police in wanton disregard of others carries with it as a likely consequence the possibility of massive physical harm, albeit to an as-yet unidentified victim. Like discharging a firearm at random in a crowd, an evasion of arrest by use of a vehicle in wanton disregard for others is 'fraught with violence.' The felony committed by Johnson was inherently dangerous." (*People v. Johnson*, *supra*, 15 Cal.App.4th at p. 174.)

The 1996 amendment to section 2800.2 increased the fines and added subdivision (b), as set forth above, *ante*, at pages 6-7. The defendant in *People v. Sewell* (2000) 80 Cal.App.4th 690 argued that the *Johnson* holding no longer applied because section 2800.2 had been materially amended. The appellate court disagreed, finding that the amendments "did not change the elements of the section 2800.2 offense, in the abstract, or its inherently dangerous nature." (*Sewell*, *supra*, at p. 694.) The court also noted that the Legislature was presumably aware of the *Johnson* decision when it amended the statute, yet it did nothing to counteract that decision in any way. Additionally, the purpose of the legislative amendments was to increase the punishment for this crime. "Against this backdrop, it would be ironic for us to construe the 1996 amendment as meaning that section 2800.2 is no

longer an inherently dangerous felony, thus weakening the deterrent effect provided by the second degree felony-murder doctrine." (*Sewell, supra,* at p. 695.)

Defendant argues that the "safety of persons" as set forth in section 2800.2 includes freedom from bodily harm or death, and thus an analogy to the disjunctive statute analyzed in *Burroughs* is appropriate. The statute in *Burroughs* was set forth in the disjunctive, allowing violations that create a risk to bodily harm, mental or physical illness, or death. It was clear from this disjunctive language in *Burroughs* that inherent risk in the statute was intended to have a broad application, with harm involving death at the highest end of the anticipated harm spectrum. Also, as noted in *Burroughs*, practicing medicine without a license it not typically an offense tinged with malevolence.

A violation of section 2800.2 is a crime of moral turpitude and evinces a general readiness to do evil. (*People v. Dewey* (1996) 42 Cal.App.4th 216, 221.) It is tinged with malevolence.

The conduct proscribed in section 2800.2 also bears more similarity to crimes found to be inherently dangerous than to crimes such as practicing medicine without a license. In *People v. Hansen, supra,* 9 Cal.4th at pages 309-311, the Supreme Court held that the offense of discharging a firearm at an inhabited dwelling can form the basis of a second degree felony-murder conviction because it is an inherently dangerous felony. "An inhabited dwelling house is one in which persons reside [citation] and where occupants 'are generally *in* or *around* the premises.' [Citation.] In firing a gun at such a structure, there always will exist a significant likelihood that an occupant may be present. Although it is true that a defendant may be guilty of this felony even if, at the time of the shooting, the residents of the inhabited dwelling happen to be absent [citation], the offense nonetheless is one that, viewed in the abstract--as shooting at a structure that currently is used for dwelling purposes---poses a great risk or 'high probability' of death." (*Id.* at p. 310.)

"In viewing the elements our task is not to determine if it is *possible* (i.e., 'conceivable') to violate the statute without great danger. By such a test no statutes would

be inherently dangerous. Rather the proper question is: does a violation of the statute involve a *high probability* of death? [Citation.] If it does, the offense is inherently dangerous." (*People v. Morse* (1992) 2 Cal.App.4th 620, 646.)

We see little difference between discharging a gun into an inhabited dwelling and a violation of section 2800.2 for purposes of finding the felony to be an inherently dangerous one. In both instances the instrument of the crime (car/gun) is capable of inflicting death. In both instances the manner in which the instrument is used (discharging a firearm at an inhabited dwelling/driving a motor vehicle with a wanton or willful disregard for safety) significantly increases the probability of death to a level where either crime is inherently dangerous. In the crime of discharging a firearm at a dwelling house there is a significant likelihood that an individual will be present. As pointed out in *Johnson*, there are always others present in the zone of danger when a defendant is attempting to elude peace officers, in the form of the officers the defendant is evading. The crimes are no less inherently dangerous to human life because they incidentally also endanger property.

The tragic death of innocent and often random victims as the result of individuals eluding a peace officer while driving a motor vehicle with a willful or wanton disregard for the safety of persons or property has become all too common. Finding that a violation of section 2800.2 can form the basis of a second degree felony-murder conviction "would serve the fundamental rationale of the felony-murder rule--the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies." (*People v. Hansen*, *supra*, 9 Cal.4th at p. 310.)

Defendant asserts that the reasoning in *People v. Sanchez* (2001) 86 Cal.App.4th 970 lends support to his argument that a violation of section 2800.2 is not an inherently dangerous felony. *Sanchez* concerned section 2800.3, the willful flight or attempt to elude a

pursuing peace officer that causes death or serious bodily injury.[3] The court in *Sanchez* applied the bipartite test from *Burroughs*. First, it found that the primary element of section 2800.3, operating a motor vehicle with the intent to evade or elude a peace officer, in the abstract does not pose a high probability of death. For example, "as can be attested to by those who watched the ludicrous pursuit of Orenthal James Simpson in his white Bronco, a driver can flee or otherwise attempt to elude pursuing officers in a manner that does not pose a high probability of death to anyone." (86 Cal.App.4th at p. 978.)

The *Sanchez* court then looked to the factor that elevated the misconduct from a misdemeanor to a felony, "i.e., when the person driving the pursued vehicle proximately causes death 'or' serious bodily injury to any person while fleeing or otherwise attempting to elude a pursuing peace officer." (*People v. Sanchez*, *supra*, 86 Cal.App.4th at pp. 978-979.) The court noted, that like the statute under review in *Burroughs*, section 2800.3 listed death and serious bodily injury in the disjunctive. Thus, section 2800.3 covered a wide range of circumstances.

The *Sanchez* court rejected the People's reliance on the *Johnson* and *Sewell* cases, finding they were "of no help to the People because the statutory language of section 2800.2 differs significantly from the wording of section 2800.3." (*People v. Sanchez*, *supra*, 86 Cal.App.4th at p. 980.) The court concluded that section 2800.3 is not a felony inherently dangerous to human life. (*Sanchez*, *supra*, at p. 980.)

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[3] Section 2800.3 provides:

"Whenever willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or serious bodily injury to any person, the person driving the pursued vehicle, upon conviction, shall be punished by imprisonment in the state prison for three, four, or five years, by imprisonment in the county jail for not more than one year, or by a fine of not less than two thousand dollars ($2,000) nor more than ten thousand dollars ($10,000), or by both that fine and imprisonment.

"For purposes of this section, 'serious bodily injury' has the same meaning as defined in paragraph (4) of subdivision (f) of Section 243 of the Penal Code."

As noted by the court in *People v. Jones* (2000) 82 Cal.App.4th 663, 669, at footnote 3, "A violation of section 2800.2 is an inherently dangerous violent felony because it requires the vehicle be 'driven in a willful and wanton disregard for the safety of person or property,' an element not present in section 2800.3."

A violation of section 2800.2 is an inherently dangerous violent felony for purposes of the second degree felony-murder rule.

II.

Felony-Murder Merger Doctrine

The felony-murder merger doctrine "developed in other jurisdictions as a shorthand explanation for the conclusion that the felony-murder rule should not be applied in circumstances where the only underlying (or 'predicate') felony committed by the defendant was *assault*. The name of the doctrine derived from the characterization of the assault as an offense that 'merged' with the resulting homicide. In explaining the basis for the merger doctrine, courts and legal commentators reasoned that, because a homicide generally results from the commission of an assault, every felonious assault ending in death automatically would be elevated to murder in the event a felonious assault could serve as the predicate felony for purposes of the felony-murder doctrine. Consequently, application of the felony-murder rule to felonious assaults would usurp most of the law of homicide, relieve the prosecution in the great majority of homicide cases of the burden of having to prove malice in order to obtain a murder conviction, and thereby frustrate the Legislature's intent to punish certain felonious assaults resulting in death (those committed with malice aforethought, and therefore punishable as murder) more harshly than other felonious assaults that happened to result in death (those committed without malice aforethought, and therefore punishable as manslaughter). [Citations.] One commentator explains that the merger rule applied to assaults is supported by the policy of preserving some meaningful domain in which the Legislature's careful gradation of homicide offenses can be implemented." (*People v. Hansen, supra,* 9 Cal.4th at pp. 311-312.)

In *People v. Ireland* (1969) 70 Cal.2d 522 the California Supreme Court restricted the scope of the felony-murder rule and adopted the felony-merger doctrine in a case involving the underlying felony of assault with a deadly weapon, where the defendant had shot and killed his wife.

"In *People v. Burton* (1971) 6 Cal.3d 375, our Supreme Court revisited and refined the *Ireland* rule, noting that the felony-murder rule may nonetheless apply where the underlying felony is committed with an 'independent felonious purpose.' [Citation.] Thus, even where the underlying felony is included within the facts of the homicide and is an integral part thereof, further inquiry is needed to determine if the killing resulted 'from conduct for an independent felonious purpose' rather than from a 'single course of conduct with a single purpose.' (*Ibid.*) In *Ireland*, the purpose of the defendant's conduct was 'the very assault which resulted in death[,]' whereas, there was an independent felonious purpose to acquire money or property belonging to another in *Burton* where the defendant attempted an armed robbery and killed one person in the process. [Citation.] [¶] Subsequently, when our Supreme Court again visited the merger rule of *Ireland* in *People v. Hansen* (1994) 9 Cal.4th 300, it noted such rule has not been extended beyond the context of assault 'even under circumstances in which the underlying felony plausibly could be characterized as "an integral part of" and "included in fact within" the resulting homicide.' [Citation.]" (*People v. Stewart* (2000) 77 Cal.App.4th 785, 797.)

In *People v. Johnson, supra,* 15 Cal.App.4th at pages 174-175, the court rejected the defendant's argument that his second degree felony-murder conviction based on a violation of section 2800.2 could not stand because the felony was an integral part of the homicide, in violation of the felony-merger rule. The court found that the rule had no application because the underlying felony had a purpose other than the assault that resulted in death. "It is clear that Johnson's intent was 'to elude a pursuing peace officer' (Veh. Code, § 2800.1) rather than to commit an assault upon any person." (*Id.* at p. 175.)

Defendant asserts that the felony merger rule applies to a violation of section 2800.2 and the holding in *Johnson* is incorrect. In particular, defendant claims that the decision in *People v. Hansen, supra,* 9 Cal.4th at pages 311-316 undermined the *Johnson* holding because the *Hansen* court declined in **all** merger cases to adopt as the determinative test whether the felony was committed with a collateral and independent felonious design. Defendant also contends that the Legislature has created a hierarchy of crimes to punish vehicular homicides and therefore, when a murder involving a vehicle is prosecuted, it must be proven beyond a reasonable doubt that the accused actually harbored malice aforethought and malice should not be imputed utilizing the felony-murder rule.

The *Hansen* opinion held that the test in determining the existence of merger is not solely whether the felony was in fact an integral part and a necessary element of the homicide because such a merger test does not apply "beyond the context of assault 'even under circumstances in which the underlying felony plausibly could be characterized as "an integral part of" and "included in fact with" the resulting homicide.'" (*People v. Stewart, supra,* 77 Cal.App.4th at p. 797.) The holding in *Hansen* did not undermine the *Johnson* holding.

The underlying felonious conduct here, eluding a peace officer with a wanton or willful disregard for safety was not a single course of conduct with a single purpose; it was conduct for an independent purpose. The purpose of defendant's conduct here was not to kill, it was to elude the peace officers.

Furthermore applying the felony-murder rule here does not pervert the Legislature's careful gradation of punishments for homicides caused while driving vehicles. (Pen. Code, §§ 191.5 & 192.) Vehicular manslaughter statutes do not encompass cases where the defendant's behavior involves a felony violation and exceeds gross negligence. (*People v. Watson* (1981) 30 Cal.3d 290, 298.) In addition, the underlying felony here "clearly is consistent with the traditionally recognized purpose of the second degree felony-murder

doctrine--namely the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies." (*People v. Hansen, supra,* 9 Cal.4th at p. 315.)

III.

Gross Vehicular Manslaughter

In *People v. Birks* (1998) 19 Cal.4th 108 the California Supreme Court found that the trial court may not instruct the jury on lesser related offenses requested by the defendant without the permission of the prosecutor. To allow the defendant to have the jury instructed on lesser related offenses would give "the defendant a superior trial right to seek and obtain conviction for a lesser uncharged offense whose elements the prosecution has neither pled nor sought to prove." (*Id.* at p. 112-113.) Vehicular manslaughter is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983.)

While acknowledging the holding in *Birks,* defendant claims that *Birks* does not apply when a defendant requests instructions on lesser related offenses to explain his defense in terms of the crimes that best describe his criminal activity. For instance, defendant asserts he presented evidence that he was intoxicated at the time of the collision, which would negate his specific intent. If the jury accepted his intoxication defense under the instructions as given, it had no alternative but to acquit him of any crime causing death, a course, defendant argues, they were unlikely to take.

Regardless of how defendant chooses to couch his argument here, it is in direct conflict with the *Birks* decision. The binding rule of *Birks* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450) forbids the trial court from modifying the charging process by instructing on related but uncharged offenses. Defendant was not entitled to instructions on gross vehicular manslaughter or any other lesser related offenses. (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586.)

IV. Applicability of Section 2800.3

A violation of section 2800.3 occurred here when defendant willfully attempted to elude a peace officer, proximately causing death or serious bodily injury. Defendant was

also convicted of second degree felony murder based on a violation of section 2800.2 for attempting to elude a pursuing peace officer while driving the vehicle with a willful or wanton disregard for the safety of persons or property.

Defendant claims that section 2800.3 is a special statute punishing a defendant when a death occurs as a result of an attempt to elude a peace officer, while felony murder as applied here is a general provision. Defendant argues that when there are two statutes that might arguably apply to a given act, any inconsistency between the two is resolved by applying the more specific provision. Thus, defendant contends, his felony murder conviction must be reversed.

Where two substantive offenses compete, the special statute prevails over the general statute. "'[W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.'" (*In re Williamson* (1954) 43 Cal.2d 651, 654.) "The rule does not apply, however, unless 'each element of the "general" statute corresponds to an element on the face of the "specific" [*sic*] statute' or 'it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute.'" (*People v. Coronado* (1995) 12 Cal.4th 145, 154.)

Defendant claims the elements of second degree murder are an unlawful killing during the commission of a felony and the specific intent to commit that felony. He argues that each of these elements corresponds to an element of section 2800.3, which requires willful flight and death.

Defendant is wrong. A second degree felony-murder conviction does not simply require the commission of a felony, the intent to commit the felony, and an unlawful death. It requires the commission of a felony **inherently dangerous to human life**. Section 2800.3 is not a felony inherently dangerous to human life. (*People v. Jones, supra*, 82 Cal.App.4th at p. 666: *People v. Sanchez, supra*, 86 Cal.App.4th at pp. 973-974.) Thus,

each element of second degree felony murder does not correspond to an element on the face of section 2800.3, and a violation of section 2800.3 will not commonly result in a felony murder conviction.[4] Section 2800.3 is not a special statute that conflicts with second degree felony murder based on a violation of section 2800.2. The trial court did not err when it instructed the jury on felony murder based on a violation of section 2800.2.

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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WALLACE, J.*

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[4] In *People v. Johnson*, *supra*, 15 Cal.App.4th at pages 175-176, the court rejected the same argument made here on different grounds. It found that the element of malice necessary for second degree murder is absent from section 2800.3. In addition it found that section 2800.3 "punishes those who inflict 'death *or* serious bodily injury,' while a murder prosecution, of course requires death, and nothing less. Thus a violation of the Vehicle Code statute 'would not necessarily or commonly result in a violation of the general murder statute.'" (*Johnson*, *supra*, at p. 176.)

* Judge of the Kern Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.